

STATE OF MICHIGAN
COURT OF APPEALS

NANCY ANN BLUMENTHAL,

Plaintiff/Counter-Defendant-
Appellee,

v

CRAIG OTTO BLUMENTHAL,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

July 2, 2015

No. 320764

Livingston Circuit Court

LC No. 12-005446-DO

Before: RIORDAN, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In this appeal by right from a judgment of divorce, defendant challenges the trial court's division of property and award of attorney fees to plaintiff. We affirm the trial court's property division, but we vacate the award of attorney fees and remand for further proceedings.

I. PROPERTY DISTRIBUTION

On appeal, defendant argues that the trial court's property distribution was inequitable and was skewed by its prejudice against him. We review for clear error a trial court's findings of fact in a divorce. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If we uphold the findings of fact, we then must determine if the dispositive ruling was fair and equitable in light of the facts. The dispositional ruling is within the discretion of the trial court, and we should affirm unless we are left with the firm conviction that it was inequitable. *Id.* at 151-152. We review de novo issues of law related to a property division. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010).

A trial court's goal in distributing marital assets in a divorce action is to reach an equitable distribution under all the circumstances. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). The division need not be mathematically equal, but the trial court must explain any significant departure from congruence. *Id.* at 717. To reach an equitable division, the trial court should consider factors such as the duration of the marriage, the contribution of each party to the marital estate, each party's situation in life, each party's earning ability, each party's age, state of health, and needs, fault or past misconduct, and any other equitable factor. *Sparks*, 440 Mich at 158-160.

As a general rule, marital assets may be divided between the parties, but each party's separate assets may not be divided. *Woodington v Shokoohi*, 288 Mich App 352, 358; 792 NW2d 63 (2010). Assets acquired or earned during the marriage are considered part of the marital estate; the appreciation of a premarital asset during the marriage should be divided as part of the marital estate, unless the appreciation was wholly passive. *Cunningham*, 289 Mich App at 201. A premarital asset can be comingled and become part of the marital estate. *Id.* Vested pension benefits acquired during the marriage must be considered part of the marital estate and are subject to division. MCL 552.18(1); *Pickering v Pickering*, 268 Mich App 1, 7-8; 706 NW2d 835 (2005). Marital assets are typically valued at the time of trial or at the time the judgment is entered, but a trial court may exercise its discretion and use a different time. *Woodington*, 288 Mich App at 365.

First, defendant generally asserts that the trial court abused its discretion by using asset values from various times, instead of using the values at the time of trial, as it indicated it would. It appears that the valuations of the various assets were supported by exhibits that were admitted at trial. Consequently, even if the exhibits reflected values of the various assets at differing dates, we cannot conclude that the trial court clearly erred in relying on the evidence. We also note that defendant's argument is particularly unavailing because, regardless of the values of these accounts that he mentions, they were to be divided evenly between the parties. For example, defendant complains that the true value of a particular Bank of America account was \$23,443, when it was listed as \$15,182 in the judgment. Any "error" is not readily identifiable because in each instance, the trial court determined that each party was entitled to half of that account, regardless of its actual value. Dividing such marital property evenly is the epitome of an equitable distribution.

Next, the trial court did not err by treating the Morgan Stanley account as marital property. The evidence showed that defendant received the securities as an inheritance from his mother, but defendant added plaintiff's name to the account. "The mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital." *Cunningham*, 289 Mich App at 201-202. However, the evidence showed that defendant treated this account differently from other accounts. He placed plaintiff's name on this account so that she would have ready access to funds should something happen to him; he did not place plaintiff's name on other accounts that contained funds he considered to be his separate property. Defendant, a certified public accountant, kept other accounts separate but, by putting plaintiff's name on this account, gave plaintiff access to and authority over this particular account; his actions gave her the right to access the funds in this account at any time should she wish to do so. In light of the fact that defendant clearly treated this particular account differently than the other accounts, the trial court did not clearly err by determining that this account was marital property and did not abuse its discretion by dividing the account evenly between the parties.

Next, the trial court did not err by finding that only \$7,000 of defendant's Charles Schwab IRA fund was his separate property. Defendant calculated that the \$7,000 premarital contribution had increased to \$84,348.65, but the evidence also showed that defendant was able to maximize his contributions to the account because plaintiff worked and contributed to the maintenance of the household. Because plaintiff's efforts contributed to the growth of this asset, the account, less the premarital contribution, was properly found to be marital property. *Id.* at

201. Moreover, the trial court treated plaintiff's 403(b) retirement fund in a similar manner, i.e., it awarded plaintiff her premarital contribution and split the remainder evenly between the parties. As a result, we discern no abuse of discretion.

Also, the trial court did not abuse its discretion by awarding plaintiff her entire defined benefit pension, notwithstanding the fact that the contributions she made after the marriage were made with marital funds. The trial court divided the bulk of the marital property equally between the parties. However, the awards of separate property were starkly different, with defendant receiving property worth \$780,039 and plaintiff receiving property worth \$24,200. The trial court found that plaintiff was more in need of retirement funds and health benefits than defendant. In addition, the trial court considered defendant's self-serving attitude¹ when determining that this asset should be awarded to plaintiff as her sole property. Pension benefits are considered part of the marital estate and therefore subject to division. MCL 552.18(1); *Pickering*, 268 Mich App at 7-8. However, a trial court is given broad discretion in fashioning a division of property. *Sparks*, 440 Mich at 158-160. The trial court properly considered the parties' respective positions and needs when determining that plaintiff should be awarded her entire pension. See *id.* at 159-160 (noting that the "needs" or "necessities and circumstances of the parties" is a relevant factor to consider when dividing the marital estate). We thus conclude that the trial court did not abuse its discretion under the totality of the circumstances.

We hold that the trial court did not clearly err in making its findings of fact and that the division of property was fair and equitable in light of those facts. *Id.* at 151-152.

II. ATTORNEY FEES

Next, defendant argues that the trial court erred by ordering him to pay a portion of plaintiff's attorney fees. We review for clear error the trial court's findings of fact underlying an award of attorney fees, *Brown v Home Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012), review de novo underlying questions of law, *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012), and review for an abuse of discretion the trial court's decision to award attorney fees and the reasonableness of the amount awarded, *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

The trial court may order one party to pay the other party's attorney fees if the record shows that such assistance is necessary to allow the other party to prosecute or defend the action. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). The trial court may also order the payment of attorney fees if the requesting party has incurred the fees as a result of the other party's unreasonable conduct during the course of the case. *Id.*; *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). When determining whether to award attorney fees resulting from a party's unreasonable conduct, a trial court must consider (1) whether unreasonable conduct occurred, (2) whether the attorney fees awarded were incurred due to this

¹ The trial court asserted that defendant wanted the court to ignore that the parties had been married for 28 years when it divided the property. In addition, the trial court concluded that defendant was responsible for the theft of plaintiff's jewelry.

unreasonable conduct, and (3) whether the fees incurred were reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

A. PERTINENT FACTS REGARDING ATTORNEY FEES

In order to evaluate the issues raised, we briefly review the pertinent facts. On January 9, 2014, the trial court, citing *Hanaway*, 208 Mich App at 298, determined that plaintiff was entitled to an award of attorney fees because it found that defendant's unreasonable behavior caused plaintiff to incur those fees. In so finding, the trial court first noted that plaintiff testified that defendant threatened to "do all he can to strip her of everything and will continue to litigate this matter until she has no more money to pursue it." This threat, the trial court found "was evident in the trial proceedings before this Court. Defendant exhibited unreasonable behaviors which caused Plaintiff to expend far more legal fees than necessary." The trial court went on to note several examples of what it found constituted defendant's unreasonable behavior. First, the court recalled that defendant's behavior resulted in plaintiff having to file a motion to move furniture out of the home; this motion resulted in proceedings before both the court and mediators. Among the items that plaintiff sought to remove, the trial court recalled that defendant denied plaintiff "permission to remove the very bed that Plaintiff slept in when she vacated the marital home." The court described defendant's behavior in this regard as "controlling and unreasonable." Second, the trial court found that defendant removed \$10,000 from a joint account without telling plaintiff. Third, the trial court cited defendant's behavior in "fighting over one half of a stainless steel silverware set," that the court described as having little value and "no stated sentimental value." Fourth, the trial court found that defendant was responsible for the break-in at plaintiff's home and the theft of her jewelry. This theft, which occurred after the divorce trial had concluded, required "extended evidentiary hearings." Finally, the trial court found that defendant was reluctant to "attempt to be fair and reasonable." All of this behavior, the trial court concluded, caused plaintiff to incur higher legal expenses.

As a result of defendant's unreasonable behavior, the trial court's January 9, 2014, opinion and order required defendant to pay 75 percent of plaintiff's legal fees, "based on normal industry rates," accumulated to the date of entry of the judgment. At the time of the trial court's opinion and order, plaintiff's counsel had not submitted any billing records.²

On January 21, 2014, plaintiff moved for entry of judgment. The proposed judgment represented that plaintiff's "entire attorney fees are \$43,500." In accordance with the trial court's January 9, 2014, opinion and order, plaintiff sought 75 percent of those attorney fees. Plaintiff did not submit any billing records in support of her request. Instead, it appears that the \$43,500 was based entirely on counsel's representations contained in the motion.

² In fact, the trial court record does not contain *any* billing records from plaintiff. This, despite the fact that plaintiff first requested attorney fees in the amount of \$25,000 after the four-day divorce trial concluded in April 2013. Plaintiff testified about her fees during trial, but she did not provide documentation in support of this or any of her other requests for fees.

On January 24, 2014, defendant objected to the proposed judgment, contesting several matters. As to attorney fees, defendant argued that “no documentation was provided to evidence the amount of said fees.” On January 30, 2014, defendant filed a motion for reconsideration of the trial court’s January 9, 2014, opinion and order. With respect to attorney fees, he challenged only the trial court’s finding that his behavior in this case was unreasonable. The trial court denied defendant’s motion for reconsideration on February 4, 2014.

On February 18, 2014, the trial court held a hearing on plaintiff’s motion for entry of judgment. On the subject of attorney fees, plaintiff’s counsel stated that “I brought with me and I will share with [defendant’s counsel] my bill today.” There is no indication in the record that plaintiff’s counsel shared billing records with defense counsel—or with the trial court for that matter—at the hearing. Additionally, plaintiff’s counsel mentioned that the parties had been paying their attorney fees from marital funds. He argued, and the trial court agreed, that each party should pay his or her attorney fees from separate funds, and then defendant should thereafter reimburse plaintiff for 75 percent of her fees. Defendant’s counsel argued several matters at the hearing, but did not raise any arguments about attorney fees.

The trial court entered the judgment of divorce on February 18, 2014. The judgment indicated—apparently consistent with plaintiff’s proposed judgment—that plaintiff had incurred fees totaling \$43,500 as of that date and that defendant was to pay 75 percent of those fees.

On February 19, 2014, plaintiff’s counsel sent defendant’s counsel a letter indicating that plaintiff’s billing records were attached. Those records are not, however, included in the lower court file, and neither party has provided us with those records on appeal. Defendant never filed a motion for reconsideration or otherwise challenged the fees that plaintiff requested. However, we note that in a March 10, 2014, motion to stay the entry of the February 18, 2014, order pending appeal, defendant protested that “[t]here have been no findings and no compliance with the requirements set out in *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008).” The motion requested: (1) a stay, (2) an interim stay pending a final decision on the stay motion, and (3) “any other relief this Court deems equitable and appropriate.” The motion did not, however, request a hearing on the reasonableness of the attorney fees awarded.

B. ANALYSIS

Defendant first argues that the trial court failed to cite a court rule or statute as the basis for its award of attorney fees. However, the trial court expressly cited *Hanaway*, 208 Mich App at 298, and awarded fees based on its finding that defendant engaged in unreasonable conduct and caused plaintiff to incur expenses as a result. Next, while defendant contests the trial court’s findings with regard to the unreasonableness of his conduct, we cannot conclude, based on the evidence contained in the record, that the trial court’s findings in this regard were clearly erroneous. See *Reed*, 265 Mich App at 164. The trial court’s findings are based, in large part, on its determination that plaintiff’s allegations were credible and that the testimony of witnesses—plaintiff and a police officer—established, by a preponderance of the evidence, that defendant was responsible for theft of plaintiff’s jewelry and the break-in at her home. We defer to the trial court’s credibility determinations as well as its role in determining the weight to be given to testimony. See *Berger*, 277 Mich App at 705.

Defendant contends that there was an “insufficient nexus” between the allegedly unreasonable behavior and the amount of fees awarded. He attempts to evaluate this issue under MCR 2.114(E), which provides a court with authority to sanction a party when the party files its pleadings for an improper purpose or when those pleadings are not well grounded in fact or warranted by existing law. He argues that “there were no findings under MCR 2.114 and no analysis of whether” his pleadings complied with the rule. He also contends that there was no nexus between the documents or pleadings he filed and the specific fees incurred by plaintiff. This argument misses the mark. The trial court neither cited nor was required to cite MCR 2.114 when it awarded fees in this case. As noted, the trial court awarded fees under the rule announced in *Hanaway*, 208 Mich App at 298, with regard to awarding attorney fees in a divorce case based on a party’s unreasonable conduct. An evaluation of defendant’s pleadings was unnecessary.

Nevertheless, we agree with defendant that the trial court abused its discretion by ordering him to pay 75 percent of plaintiff’s attorney fees. “The fee applicant bears the burden of supporting its claimed hours with evidentiary support. The fee applicant *must submit* detailed billing records, which the court *must examine* and opposing parties may contest for reasonableness.” *Augustine v Allstate Ins Co*, 292 Mich App 408, 432; 807 NW2d 77 (2011), quoting *Smith*, 481 Mich at 532 (internal citation omitted; emphasis added). Here, plaintiff bore the burden of establishing the amount of fees incurred because of defendant’s unreasonable conduct. *Borowsky*, 273 Mich App at 687; *Reed*, 265 Mich App at 165-166. Where it does not appear that plaintiff ever submitted her billing records to the trial court, we cannot conclude that she satisfied that burden, nor can we conduct any meaningful review of this matter. In light of plaintiff’s failure to satisfy her burden, we conclude that the trial court abused its discretion by requiring defendant to pay 75 percent of an attorney-fee bill that plaintiff never produced. See *Reed*, 265 Mich App at 166 (stating that the trial court abused its discretion, in part, because “plaintiff submitted no evidence regarding what fees were actually incurred because of defendant’s misconduct”). Indeed, “[t]he trial court may not award attorney fees, as apparently occurred here, solely on the basis of what it perceives to be fair or on equitable principles.” *Id.* As such, we vacate the trial court’s award of attorney fees and remand for plaintiff to establish the fees she incurred because of defendant’s unreasonable conduct.

Plaintiff also bore the burden of establishing that her requested fees were reasonable. *Id.* at 165-166. In this regard, we note that defendant faults the trial court for failing to hold a hearing as to the reasonableness of plaintiff’s requested fees. When the reasonableness of attorney fees “*are contested*,” it is incumbent upon the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services.” *Id.* at 166 (emphasis added); see also *Smith*, 481 Mich at 532 (explaining that the party opposing a fee request is entitled to an evidentiary hearing if a factual dispute exists over the reasonableness of the fees). Here, however, defendant never challenged the reasonableness of the fees before the trial court. We decline to fault the trial court for failing to hold a hearing that was never requested. However, we note that, on remand, nothing would prohibit defendant from challenging the reasonableness of whatever fees are ultimately awarded.

III. REMAND TO DIFFERENT JUDGE

Finally, defendant argues that this case should be remanded for further proceedings before a different judge. Defendant asserts that the trial court's impression of him, including that he was involved in the theft of plaintiff's jewelry, was not appropriate based on the record, and this skewed impression resulted in an improper division of property.

An appellate court may remand a case to a different trial court judge "if the original judge would have difficulty in putting previously expressed views or findings out of his or her mind, if reassignment is advisable to preserve the appearance of justice, and if reassignment would not entail excessive waste or duplication." *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

Defendant argues that the trial court repeatedly showed its disapproval of his behavior throughout the proceedings and that this disapproval skewed the trial court's decisions regarding the division of the property. The trial court did find that defendant engaged in unreasonable conduct and delaying tactics that warranted his paying a portion of plaintiff's attorney fees, but the trial court's frustration with defendant's behavior was not unreasonable, and we are not persuaded that the trial court's property division was inequitable. Moreover, adverse rulings do not support a finding that a trial court is prejudiced against a party and that the matter should be assigned to a different judge. See *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995). Defendant has not established that he is entitled to a different judge on remand.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Jane M. Beckering